

USDC SCAN INDEX SHEET



NATIONAL ENTERPRISES

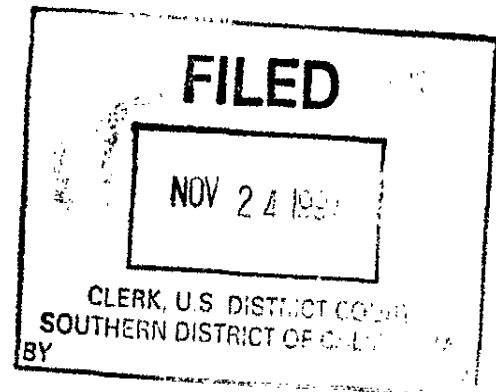
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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 **NATIONAL ENTERPRISES, INC.,**

12 **Plaintiff,**

13 **vs.**

14 **JOSEPH-BURNHAM**  
15 **PARTNERSHIP,**

16 **Defendant.**

17 **And All Related Cross-Actions**  
18

**CASE NO. Civ. 97-1185-B (CGA)**

**ORDER DENYING  
PLAINTIFF/CROSS-  
DEFENDANT NATIONAL  
ENTERPRISE'S AND THIRD-  
PARTY DEFENDANT  
MOREHOUSE ACQUISITIONS'  
MOTION TO DISMISS FOR  
IMPROPER VENUE**

19 On September 26, 1997, Plaintiff/Cross-Defendant National Enterprise, Inc. (NEI)  
20 and Third-Party Defendant Morehouse Acquisitions No. 1, LLC (Morehouse) filed a motion  
21 pursuant to Fed. R. Civ. P. 12(b)(3) to dismiss the complaints filed against them by the  
22 Federal Deposit Insurance Corporation (FDIC), a cross-defendant in this action, for improper  
23 venue. Defendants/Cross Complainants Joseph-Burnham Partnership (JBP), Malin  
24 Burnham, Robert Lichter, Kenneth R. Satterlee, John Tanner, Joseph Realty Management,  
25 L.P., Joseph Realty Management, Inc., and Joseph Development Corporation filed an  
26 opposition brief on October 31, 1997. FDIC filed an opposition brief on November 3, 1997.  
27 NEI and Morehouse filed a reply to the opposition papers on November 13, 1997. Upon due  
28 consideration of the moving and responding papers and for the reasons set forth below, the

43<sup>1</sup> - ENTERED ON

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1 Court hereby DENIES the motion to dismiss the FDIC's complaints for improper venue.

## 2 I. BACKGROUND

3 The underlying case is an action for collection of a debt. Because the Federal Deposit  
4 Insurance Corporation is a party to this action, the Court has subject matter jurisdiction over  
5 it pursuant to 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331.

6 On June 28, 1991, Joseph-Burnham Partnership (JBP), a general partnership, entered  
7 into a loan agreement with Old Stone Bank (OSB). The \$2,000,000 unsecured loan was  
8 evidenced by a promissory note (OSB note). The general partners of JBP signed the note on  
9 behalf of the partnership. On July 8, 1994, OSB was declared insolvent, and the Resolution  
10 Trust Corporation (RTC) became the receiver for OSB. FDIC became the new receiver  
11 when the RTC dissolved on December 31, 1995. On February 9, 1996, FDIC, acting as  
12 receiver, assigned all of OSB's interest in the loan, along with the note, to Morehouse  
13 pursuant to a loan sale agreement (Agreement) negotiated by the RTC before its dissolution.  
14 Morehouse in turn assigned the loan to NEI on February 20, 1996.

15 On August 21, 1996, NEI filed an action in the California Superior Court in San  
16 Diego to collect the debt from JBP. On June 5, 1997, JBP filed a counterclaim against NEI  
17 and a cross-complaint in interpleader against FDIC asserting that the OSB note had been  
18 unlawfully acquired from FDIC. JBP most likely did this to avoid the possibility of multiple  
19 liability in case it lost the suit with NEI, and then if FDIC later were to claim that it was the  
20 true owner of the OSB note. The FDIC promptly removed the action to this Court. On  
21 September 8, 1997, the FDIC filed an answer to the JBP interpleader complaint, a  
22 counterclaim against NEI, and a third-party complaint against Morehouse. In its claims,  
23 FDIC also asserts that Morehouse and NEI conspired to obtain the OSB note illegally. The  
24 FDIC seeks to determine who the true owner of the note is and to force NEI and/or  
25 Morehouse to disgorge any illegal profits either or both of them may have made from the  
26 loan sale.

## 27 II. DISCUSSION

### 28 A. Standard of law

1 In deciding a motion brought under Fed. R. Civ. P. 12(b)(3), a district court is not  
 2 required to accept the facts alleged in the pleadings as true, and the court may consider facts  
 3 outside the pleadings. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996).

4 Generally, a case must be brought in

5 (1) a judicial district where any defendant resides, if all defendants reside in  
 6 the same state, (2) a judicial district in which a substantial part of the events or  
 7 omissions giving rise to the claim occurred, or a substantial part of the property  
 8 that is the subject of the action is situated, or (3) a judicial district in which any  
 9 defendant may be found, if there is no district in which the action may  
 10 otherwise be brought.

11 28 U.S.C. § 1391(b). If venue is improper 28 U.S.C. § 1406(a) requires dismissal, or, if it is  
 12 in the interests of justice, transfer to another district, upon a timely and sufficient objection  
 13 by the defendant. Further, once an objection to venue has been raised, the plaintiff (FDIC,  
 14 for the purpose of this motion) bears the burden of establishing that venue is proper. A  
 15 district court's decision to dismiss or transfer a case for improper venue is reviewable only  
 16 for abuse of discretion. Central Valley Typographical Union No. 46 v. McClatchy  
 17 Newspapers, 762 F.2d 741, 745 (9th Cir. 1985).

18 **B. Venue in this district is proper under the venue statutes.**

19 Under the normal rules, venue in this Court is proper. 28 U.S.C. § 1391(b) provides  
 20 the venue rules for cases brought under federal question jurisdiction. It states that venue is  
 21 proper (1) where any defendant resides, if all defendants reside in the same state; (2) a  
 22 judicial district in which a substantial part of the events or omissions giving rise to the claim  
 23 occurred; or (3) a judicial district in which any defendant may be found, if there is no district  
 24 in which the action may otherwise be brought. 28 U.S.C. § 1391(c) specifies that a corporate  
 25 defendant resides in any judicial district in which it is subject to personal jurisdiction at the  
 26 time the action is commenced. Morehouse and NEI are both headquartered in San Diego.  
 27 Therefore, venue as to them is proper in the Southern District of California.

28 **C. The forum selection clause.**

Movants claim that the Court should dismiss FDIC's counterclaim and third-party  
 complaint for improper venue because of a forum selection clause contained in the loan sale  
 agreement (Agreement) between FDIC and Morehouse. The relevant clause provides,

1 This Agreement shall be construed, and the rights and obligations of Seller and  
 2 Buyer hereunder determined, in accordance with federal statutory or common  
 3 law ("Federal Law"). Insofar as there may be no applicable rule or precedent  
 4 under Federal Law and insofar as to do so would not frustrate the purposes of  
 5 FIRREA or any provision of this Agreement, the local law of the State of New  
 6 York shall be deemed to control without giving effect to any choice of law  
 7 principles. . . . [T]he parties agree that any legal actions between Buyer and  
Seller regarding the purchase of the Loans hereunder shall be originated in the  
United States District Court in and for the State of New York, subject to any  
rights of removal Seller may have, and Buyer hereby consents to the  
jurisdiction of said court in connection with any action or proceeding initiated  
concerning this Agreement . . . .

8 Agreement 35-36 (emphasis added).

9 FDIC and the JBP parties contend that the forum selection provision does not apply to  
 10 the claims filed in this action by FDIC because these claims were not original actions  
 11 initiated by FDIC or Morehouse. Furthermore, FDIC argues that because NEI was not a  
 12 party to the Agreement, it is not entitled to enforce any of the terms therein. Finally, the  
 13 opposing parties assert that regardless of the Agreement, the doctrine of "ancillary venue"  
 14 prohibits Morehouse from objecting to venue.

15 The forum selection clause provides that any legal action between FDIC and  
 16 Morehouse must originate in New York. The clause also applies as between FDIC and NEI  
 17 because NEI stands in the shoes of Morehouse as assignee of Morehouse's rights under the  
 18 Agreement. FDIC's third-party claim and counterclaim would be subject to the forum  
 19 selection clause if they were filed independently, but that is not the case here. This case was  
 20 initiated by NEI, but neither FDIC nor Morehouse were parties to the original action.  
 21 FDIC's claims are subject to this Court's supplemental jurisdiction over related claims  
 22 pursuant to 28 U.S.C. § 1367(a). That statute replaced the old "pendant" and "ancillary"  
 23 jurisdiction categories, providing for one form of subject matter jurisdiction over all related  
 24 claims. It provides,

25 [I]n any civil action of which the district courts have original jurisdiction, the  
 26 district courts shall have supplemental jurisdiction over all other claims that are  
 27 so related to claims in the action within such original jurisdiction that they  
 form part of the same case or controversy . . . . Such supplemental jurisdiction  
 shall include claims that involve the joinder or intervention of additional  
 parties.

28 The issue of who rightfully owns the OSB note is a key issue in the underlying litigation.

1 FDIC's claims against Morehouse and NEI also require determination of this issue and are  
 2 therefore part of the same case or controversy as the NEI/JBP dispute. Therefore, the court  
 3 has proper supplemental subject matter jurisdiction over these claims.

4 The Court elects to follow the precedent of other courts in holding that third-party  
 5 defendants and counter-defendants may not object to venue over the supplemental claims  
 6 against them. E.g., ABCKO Music, Inc. v. Beverly Glen Music, Inc., 554 F. Supp. 410, 412  
 7 (S.D.N.Y. 1983); Sweetheart Plastics, Inc. v. Illinois Tool Works, Inc., 286 F. Supp. 62, 66  
 8 (N.D. Ill. 1968). The rule should logically be the same regardless of whether objection to  
 9 venue is made under the venue statutes or pursuant to a forum selection clause. The common  
 10 sense behind this rule is apparent on these facts. If FDIC's claims in this action are  
 11 dismissed, FDIC would likely re-file its claims in New York and seek to consolidate the  
 12 cases. In that event, the entire case would either be heard in the Southern District of  
 13 California, or it would be litigated in New York. The latter result would be extremely unfair  
 14 to JBP and its partners, who were not parties to the Agreement and never did anything that  
 15 would give them reason to anticipate being haled into court in New York. The former result  
 16 would be the same as if the claims were never dismissed.

### 17 III. CONCLUSION

18 For the reasons stated above, the Court hereby DENIES the Morehouse/NEI motion to  
 19 dismiss for improper venue.

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 23 IT IS SO ORDERED.

24 NOV 24 1997

25 DATED: \_\_\_\_\_



UNITED STATES DISTRICT JUDGE

26  
 27  
 28 cc: All Parties  
 Magistrate Judge